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McDonnell Douglas, 1973-2003: May You Rest in Peace?

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Casenote

McDONNELL DOUGLAS, 1973-2003: MAY YOU REST IN PEACE?

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All this was a long time ago, I remember,
And I would do it again, but set down
This set down
This: were we led all that way for
Birth or Death? There was a Birth, certainly,
We had evidence and no doubt. I have seen birth and death,
But had thought they were different; this Birth was
Hard and bitter agony for us, like Death, our death.
We returned to our places, these Kingdoms,
But no longer at ease here, in the old dispensation,
With an alien people clutching their gods.
I should be glad of another death.[1]

I. INTRODUCTION

It would be hard to find an opinion of the United States Supreme Court that said less but changed an area of the law more dramatically than *Desert Palace, Inc. v. Costa*.[2] The unanimous opinion of the Court holds that a plaintiff in an employment discrimination case does not have to produce direct evidence to be entitled to a mixed-motives jury instruction under Title VII; rather, a plaintiff simply must present sufficient evidence that a prohibited characteristic was a motivating factor for the employer's action. The rationale for the holding is straightforward. The Court

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1. T.S. Eliot, *Journey of the Magi* (1927).
2. 123 S. Ct. 2148 (2003).

reasoned that the Civil Rights Act of 1991 amendments to Title VII do not refer to direct evidence. The Court further explained that circumstantial evidence is not inherently inferior to direct evidence. The opinion is lean, and yet it has drastically changed employment discrimination law, implicitly abolishing thirty years of judicially developed law.

The *Costa* opinion does not even mention *McDonnell Douglas Corp. v. Green*.[3] Make no mistake about it, for Title VII claims at least,[4] the old *McDonnell Douglas* proof structure is as dead as a doornail. The courts need to recognize that *McDonnell Douglas* cannot survive in a post-*Costa* world. The Supreme Court should have said that in *Costa*. Lawyers and judges do not like change, however, and it will be hard to let go.

It is important to recognize and appreciate that *McDonnell Douglas* died on its thirtieth birthday and to consider the implications of its demise for employment discrimination law. Plaintiffs and employee rights advocates are celebrating the death of the *McDonnell Douglas* proof structure, the ascendancy of the mixed-motives structure, and the birth of a new pro-employee/pro-plaintiff era in employment discrimination law. I see it differently. I think *Costa* is a birth that may not prove as helpful to plaintiff-employees as is expected, and the death of *McDonnell Douglas* may not cause as much grief for defendant-employers as they fear. As the law develops in the aftermath of *Costa*, the birth and death may be hard to separate, and the celebrants and mourners may find that they are living in a world not that different from the one they knew before.

II. THE LONG, BOGGY ROAD FROM *MCDONNELL DOUGLAS* TO *COSTA*

A. *Thirty Years of* McDonnell Douglas

In 1973, the United States Supreme Court announced in *McDonnell*

3. 411 U.S. 792 (1973).

4. *Costa* does not necessarily render *McDonnell Douglas* inapplicable to intentional discrimination claims under the Age Discrimination in Employment Act, the Americans with Disabilities Act, 42 U.S.C. §1981, or state employment discrimination laws. The rationale for the *Costa* holding focuses on the changes wrought by the Civil Rights Act of 1991. That act, by its terms, modified the mixed-motives analysis for Title VII cases. For example, a federal district court held that *Costa* has no effect on state discrimination law and applied the *McDonnell Douglas* analysis to the state claims in Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003). *See infra* text accompanying note 90. The *Dare* court's analysis may be state-specific, however, because the *Price Waterhouse* mixed-motives analysis had never been adopted for state discrimination claims. Some pre-*Costa* cases held that the Civil Rights Act of 1991 did not modify the *Price Waterhouse* mixed-motives analysis for claims under the Age Discrimination in Employment Act. *See, e.g.*, Lewis v. Young Men's Christian Ass'n, 208 F.3d 1303 (5th Cir. 2000).

Douglas[5] a proof structure to facilitate analysis of employment discrimination cases involving intentional discrimination. The decision announced a three-part analytical framework for intentional discrimination cases in which the plaintiff produces circumstantial evidence. The first step under this framework requires the plaintiff to establish a prima facie case of intentional discrimination. To meet the prima facie case, a plaintiff must prove that: 1) the plaintiff is a member of a protected class; 2) the plaintiff applied for and was qualified for the job at issue; 3) despite plaintiff's application and qualifications, plaintiff was rejected; and 4) the position remained open and the defendant-employer continued to seek applicants from persons of the same qualifications as the plaintiff.[6] Once the plaintiff establishes a prima facie case, a presumption is created that the defendant-employer unlawfully discriminated against the plaintiff.[7] At this point, the burden shifts to the defendant to rebut the presumption of intentional discrimination by producing evidence of a legitimate, nondiscriminatory reason for rejecting the plaintiff or preferring someone else.[8] Once the defendant-employer satisfies this burden of production, the burden shifts back to the plaintiff to prove that the employer's reasons are merely a pretext for discrimination.[9] The meaning and effect of the second and third stages were developed in subsequent Supreme Court decisions: *Texas Department of Community Affairs v. Burdine*,[10] *St. Mary's Honor Center v. Hicks*,[11] and *Reeves v. Sanderson Plumbing Products, Inc.*[12]

For three decades the *McDonnell Douglas* or pretext analysis has been the centerpiece of employment discrimination law. Although developed in a Title VII case, the pretext analysis has been applied under all the federal employment discrimination laws.[13] Because the vast majority of employment discrimination cases are intentional discrimination cases (disparate treatment) and the overwhelming majority of those cases are based on circumstantial evidence, the pretext proof structure has been used to analyze most employment discrimination cases. Thus, for thirty years, any change or development regarding the *McDonnell Douglas* analysis has been a matter of great significance in employment discrimination law.

Although the pretext proof structure has been characterized by the

5. 411 U.S. 792 (1973).
6. *Id.* at 802.
7. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).
8. *McDonnell Douglas*, 411 U.S. at 802.
9. *Id.* at 804.
10. 450 U.S. 248 (1981).
11. 509 U.S. 502 (1993).
12. 530 U.S. 133 (2000).
13. *See, e.g.*, West v. Nabors Drilling USA, Inc., 330 F.3d 379 (5th Cir. 2003) (applying pretext analysis in ADEA case); Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21 (1st Cir. 2002) (applying pretext analysis in ADA case).

Court as an aid to plaintiffs[14] and it has done yeoman's service as the analytical structure for most employment discrimination cases, it has not been very popular among many scholars and employee rights advocates, and many have called for its abandonment.[15] Although it was developed to facilitate plaintiffs in presenting their cases, most of the Supreme Court's subsequent interpretations have not been favorable to plaintiffs.[16] For example, in the first major Supreme Court decision to explain and refine the *McDonnell Douglas* analysis, *Burdine*,[17] the Supreme Court reversed the court of appeals' holding that not only the burden of production, but also the burden of persuasion shifts to the defendant at stage two of the analysis.[18] The Supreme Court also rejected the court of appeals' holding that at stage two the defendant's proof of its legitimate, nondiscriminatory reason must include evidence that the objective qualifications of the plaintiff were inferior to those of the person selected.[19] Thus, the Supreme Court in *Burdine* interpreted stage two less advantageously for plaintiffs both procedurally and substantively than had the court of appeals.

Most notorious in the development of *McDonnell Douglas* was the battle of pretext-plus versus pretext-only.[20] The substantive issue was whether proving that the employer's legitimate, nondiscriminatory reason was pretextual at stage three was the equivalent of proving discrimination. Defendants argued that it was not enough for plaintiffs to prove pretext; rather, they must also prove the ultimate issue of discriminatory motive. Plaintiffs argued that the analysis equated the two proofs; proving pretext meant that a plaintiff had proved discrimination. This issue was important regarding two burdens resting on plaintiffs: the burden of persuasion and the burden of production. In *St. Mary's Honor Center v. Hicks*,[21] the Court held that plaintiffs do not, as a matter of law, win cases (satisfy the burden

14. Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

15. *See, e.g.*, Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2236 (1995); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371 (1997). Professor John Valery White collects and critiques criticisms of *McDonnell Douglas* in John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709 (2002).

16. *See, e.g.*, Malamud, *supra* note 15, at 2236 (describing *McDonnell Douglas* and its progeny as departing from pro-plaintiff decisions of the early 1970s).

17. 450 U.S. 248 (1981).

18. *Id.* at 254-57.

19. *Id.* at 258-59.

20. These terms were coined in Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

21. 509 U.S. 502 (1993).

of persuasion) by proving pretext; they may win, but they do not necessarily win by proving pretext. Although the case was hailed as a great victory by defense interests and decried as a calamity by employee rights advocates,[22] the more significant issue was what stage three pretext meant regarding defendants' motions challenging sufficiency of the evidence (motions for summary judgment and judgment as a matter of law). *Hicks*, addressing as it did the burden of persuasion, did not resolve that issue. In *Reeves*,[23] the Supreme Court rejected a pretext-plus approach to the issue, and it leaned toward pretext-only, but refused to adopt a rule. Instead the Court said that proof of pretext would permit a trier of fact to conclude the defendant discriminated, but it would not necessarily always sustain such a finding.[24]

Thus, one reason for *McDonnell Douglas* falling into such disfavor with plaintiff-employee interests and theoreticians is that its three stages have not been developed by courts and the Court in ways that they favor. For plaintiffs, neither stage two nor stage three developed as favorably as they would have liked. Theoreticians disparage the meaningless of the structure if plaintiffs can satisfy the two stages on which they bear burdens and then still have to prove something else (the ultimate issue of discrimination) in order to survive a challenge to the sufficiency of the evidence or to satisfy the burden of persuasion.[25]

The other reason why *McDonnell Douglas* became so unpopular is the emergence of the mixed-motives proof structure in 1989. As the next section discusses, the alternate proof structure developed as a seemingly more plaintiff-friendly analysis than the *McDonnell Douglas* pretext structure. Moreover, the issue of which of the two proof structures applied in any particular case vexed lawyers, courts, scholars, and everyone else. The criterion relied upon to make the distinction (direct evidence or circumstantial evidence) has been both difficult to apply in practice and difficult to justify in theory.

B. Mixing It Up: Price Waterhouse *and the Civil Rights Act of 1991*

In 1989 the Supreme Court announced a second proof structure for

22. *See, e.g.*, Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994).

23. 530 U.S. 133 (2000).

24. *Id.* at 148. For detailed consideration of *Reeves* and its implications for employment discrimination law, see John V. White & Gregory Vincent, Symposium, *Employment Discrimination and the Problems of Proof*, 61 LA. L. REV. 487 (2001); *see also* White, *supra* note 15, at 750-54 (discussing the minimal effect that *Reeves* had on limiting the disposition of disparate treatment cases by judges through summary judgment or judgment as a matter of law).

25. *See, e.g.*, Calloway, *supra* note 22.

intentional discrimination cases in *Price Waterhouse v. Hopkins*.[26] The plurality's proof structure is commonly referred to as the mixed-motives analysis because it permits a finding that the adverse employment decision was taken for lawful and unlawful reasons. The first step of this analysis required the plaintiff to show that a protected characteristic was a motivating factor in the employment decision.[27] Justice O'Connor's concurring opinion stated the standard of causation as higher than motivating factor: causation should be measured by determining whether a protected characteristic was a substantial factor in the employment decision.[28] Once the plaintiff met her burden, the burden then shifted to the defendant-employer to prove, by a preponderance of the evidence, that it would have taken the same action for legitimate, nondiscriminatory reasons.[29] This affirmative defense, often called the same-decision defense, permitted the defendant to escape liability.

After *Price Waterhouse,* courts struggled with two issues. First, they had to glean the standard of causation from the divided *Price Waterhouse* decision. Justice O'Connor's substantial factor test was the standard used by most courts after the *Price Waterhouse* decision. Second, courts had to decide what criterion determined whether a particular case was analyzed under *Price Waterhouse* or *McDonnell Douglas*. Courts seized upon the distinction made by Justice O'Connor in her concurrence: cases involving direct evidence were analyzed under mixed-motives, and cases involving circumstantial evidence were analyzed under the pretext framework.[30]

The substantial factor causation standard was legislatively overruled by the amendments to Title VII in the Civil Rights Act of 1991.[31] Title VII now provides that an unlawful employment practice is established when it is demonstrated that a protected characteristic was a motivating factor for an employment decision.[32] The Civil Rights Act of 1991 also changed the employer's affirmative defense in the mixed-motives analysis. No longer is evidence that the same action would have been taken for legitimate, nondiscriminatory reasons a complete defense. Under the amendments, a plaintiff's remedies are merely limited by the defendant-employer's

26. 490 U.S. 228 (1989).

27. *Id.* at 257.

28. *Id.* at 265 (O'Connor, J., concurring).

29. *Id.* at 257.

30. *Id.* at 270-71 (O'Connor, J., concurring). For an argument that Justice O'Connor's statements about direct evidence should be viewed as dictum because her vote did not substantially affect the outcome of the case, see Recent Cases, *Employment Law-Discrimination: Ninth Circuit Finds for Employee in a Mixed-Motive Case Without Direct Evidence of Discrimination:* Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) (*en banc*), *cert. granted,* 123 S. Ct. 816 (2003), 116 HARV. L. REV. 1897 (2003).

31. Pub. L. No. 102-166, 105 Stat. 1071.

32. 42 U.S.C. §2000e-2(m).

affirmative defense: declaratory and injunctive relief (except admission, reinstatement, hiring, promotion, or payment), attorney's fees and costs are available, but no damages or payments of money to the plaintiff.[33]

After the Civil Rights Act of 1991, courts continued to decide which proof structure applied based on whether the evidence was direct or circumstantial.[34] Courts adopted different approaches, however, to what constituted direct evidence.[35] The distinction between the two types of evidence thus was not understood consistently or well, and much depended upon the determination of which proof structure applied. One court expressed this well:

> [A]lthough the results of the [pretext and mixed-motives] analyses are significantly different, the analytic difference between these two types of cases is razor-thin, which has made the area a particularly difficult one for the courts, and has prompted significant criticism from the academy.[36]

Courts and commentators have described the two-proof-structure situation as a swamp,[37] a quagmire,[38] and a morass.[39] Indeed, many commentators have urged clarification of the law in this area through abandonment of the *McDonnell Douglas* analysis and retention of mixed-motives.[40] Given the pedigree of *McDonnell Douglas*, that result seemed unlikely until the Ninth Circuit broke with established law in deciding *Costa*.

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33. 42 U.S.C.A. §2000e-5(g)(2)(B).

34. *See, e.g.*, Fuller v. Phipps, 67 F.3d 1137 (4th Cir. 1995); Russell v. Microdyne Corp. 65 F.3d 1229 (4th Cir. 1995).

35. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 851-52 (9th Cir. 2002) (discussing three different approaches in the circuits to defining direct evidence for purposes of determining the applicable proof structure), *aff'd*, 123 S. Ct. 2148 (2003).

36. *Russell*, 65 F.3d at 1237.

37. Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000).

38. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 853 (9th Cir. 2002), *aff'd*, 123 S. Ct. 2148 (2003).

39. *Id.*

40. Professor Michael Zimmer has been the principal proponent. *See, e.g.*, Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693 (2000) [hereinafter Zimmer, *Chaos or Coherence*]; Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563 (1996) [hereinafter Zimmer, *Emerging Uniform Structure*]; *see also* Robert A. Kearney, *The High Price of* Price Waterhouse*: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303, 310, 312 (2003); Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234 (2001).

C. Costa: *Blazing a Trail Out of the Morass*

Catherine Costa was characterized as a trailblazer. She was employed by Caesars Palace Hotel and Casino (Caesars), where she worked in the warehouse operating forklifts and pallet jacks to retrieve food and beverage orders. Costa was the only woman employed in this job and the only woman in the bargaining unit covered by a collective bargaining agreement between Caesars and Teamsters Local 995. Despite her work being characterized as excellent and good, Costa experienced problems with management and her coworkers. Costa noticed that she was being singled out because she was a woman and when she voiced these concerns, she was treated as an outcast.[41]

Costa asserted that she was subjected to a number of actions, including informal rebukes, denial of privileges accorded to male coworkers, suspension, and ultimately termination. Even though the evidence presented at trial showed Costa had a long history of disciplinary problems,[42] the Ninth Circuit, sitting en banc, determined that she had received harsher discipline than her male coworkers, that she was treated differently from the men in the assignment of overtime, and that "she was penalized for her failure to conform to sexual stereotypes."[43]

Costa's termination occurred after a verbal and physical altercation with a male coworker. The male coworker, a twenty-five-year employee with a good disciplinary record,[44] received a five-day suspension. Costa, on the other hand, was terminated. Both Costa and the male coworker grieved their respective disciplines pursuant to the collective bargaining agreement, and both decisions were upheld by the arbitrator. Costa then filed suit alleging gender discrimination and termination in violation of Title VII of the Civil Rights Act of 1964. The trial court dismissed her claim of sexual harassment on summary judgment, but allowed her other disparate treatment claims to proceed.[45] The jury returned a verdict in favor of Costa for $64,377.74 in back pay, $200,000 in compensatory damages,[46] and $100,000 in punitive damages. Caesars appealed.

Caesars' principal contention on appeal was that the district court erred in giving a mixed-motives jury instruction rather than a *McDonnell Douglas* pretext instruction.[47] Caesars did not contend that the jury

41. *Costa*, 299 F.3d at 844.

42. Costa v. Desert Palace, Inc., 268 F.3d 882 (9th Cir. 2001), *aff'd in part, rev'd in part and remanded in part*, 299 F.3d 838 (9th Cir. 2002).

43. *Costa*, 299 F.3d at 845.

44. *Costa*, 268 F.3d at 884.

45. *Costa*, 299 F.3d at 846.

46. This amount was later remitted to $100,000. *Id.* at 847.

47. *Costa*, 268 F.3d at 885.

> You have heard the evidence that the defendant's treatment of the plaintiff was

instruction misstated the law regarding a mixed-motives analysis; rather, it argued that it was legal error to give this instruction based on the evidence presented.[48]

1. The Ninth Circuit Panel Decision

In its opinion, the Ninth Circuit panel discussed how a Title VII claim may proceed on either a single-motive (or pretext) theory or a mixed-motives theory.[49] Notably, at no time during the litigation did Costa seek to raise a pretext claim.[50] Costa specifically contended that the evidence she presented showed that Costa was definitely being treated differently from her male coworkers and a reasonable mind could conclude that it was because she was a woman.[51] Holding that the mixed-motives jury instruction was improper, the court concluded that even if the evidence of differential treatment raised an inference of discrimination, it did not prove that gender was a motivating factor in the employment decision. Because Costa failed to produce direct and substantial evidence of discriminatory animus, the district court erred in giving a mixed-motives jury instruction.[52]

2. The Ninth Circuit Decision on Rehearing En Banc

Rehearing the case en banc, the Ninth Circuit affirmed in part, reversed and remanded in part.[53] The nine member majority, analyzing the text of Title VII, determined that "[t]he inquiry is simply that of any civil

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> motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Id.

48. *Id.* at 886.

49. *Id.*

50. *Id.* at 890.

51. *Id.* at 888.

52. *Id.* at 889. The jury verdict regarding discrimination was vacated. The panel also reversed the judgment regarding the termination claim and remanded the punitive damages claim in light of Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1994).

53. Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002), *aff'd*, 123 S. Ct. 2148 (2003). For commentary that is critical of the Ninth Circuit's decision, see Brian W. McKay, Note, *Mixed Motives Mix-Up: The Ninth Circuit Evades the Direct Evidence Requirement in Disparate Treatment Cases*, 38 TULSA L.J. 503, 519 (2003).

case: whether the plaintiff's evidence is sufficient for a rational factfinder to conclude by a preponderance of the evidence that the employer violated the statute that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[54] Applying the motivating factor standard to causation, the Ninth Circuit turned to the question of the need for direct evidence of discrimination after the Civil Rights Act of 1991's amendments to Title VII. Justice O'Connor's concurrence in *Price Waterhouse* referenced the need for direct evidence to show the employer's decision was discriminatory before the burden would be shifted to the defendant employer.[55] The Ninth Circuit rejected this special requirement and concluded that Congress did not impose a special or heightened evidentiary burden on the plaintiff in a case involving possible mixed motives.[56] Accordingly, a plaintiff can establish a Title VII violation by a preponderance of the evidence (direct or circumstantial) that a protected characteristic played a motivating factor in the employer's decision.[57] The court then turned to the *McDonnell Douglas* pretext analysis and explained how and why it survives even after the abrogation of the direct evidence requirement for mixed-motives.[58]

3. The Supreme Court Decision

The Supreme Court opinion said much less than the Ninth Circuit's opinion. The holding was succinctly stated: "In order to obtain an instruction under §2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice'.... [D]irect evidence of discrimination is not required in mixed-motive cases."[59] The rationale for the holding was simple. First, the section of the Civil Rights Act of 1991 that amended Title VII to provide for the motivating factor standard does not mention a direct evidence requirement.[60] Second, circumstantial evidence is not inherently inferior to direct evidence, and absent a statutory requirement, the Court has never restricted a litigant to production of direct evidence.[61] Finally, the Court did not believe that Congress would have used the word "demonstrate" to require direct evidence in §2000e-2(m) and

54. *Costa*, 299 F.3d at 848 (quoting 42 U.S.C. §2000e-2(m)).
55. *Id.* at 849.
56. *Id.* at 851.
57. *Id.* at 853-54.
58. For discussion of this part of the court's opinion, see *infra* Part III.A.2.
59. *Costa*, 123 S. Ct. at 2155 (quoting 42 U.S.C. §2000e-2(m)).
60. *Id.* at 2153.
61. *Id.* at 2154.

differently in the same-decision defense section, §2000e-5(g)(2)(B).[62]

III. OF BIRTHS AND DEATHS

A. *Is* McDonnell Douglas *Dead? Views of the Supreme Court and Ninth Circuit*

1. Empty Supreme Court Opinion, Loaded Oral Arguments

The Supreme Court said nothing in its opinion in *Costa* about *McDonnell Douglas*. The only statement that even comes close is in a footnote: "This case does not require us to decide when, if ever, §107 applies outside the mixed-motive context."[63] Essentially, the Court said it did not have to answer the question of whether mixed-motives has consumed *McDonnell Douglas*. Is it so clear, then, that thirty years of employment discrimination law is dead? Yes. This is a monumental point, and it is one that neither courts[64] nor commentators seem to accept.[65]

In the oral argument of *Costa*, the effect of affirming the Ninth Circuit decision on the two proof structures was debated. For example, the attorney for the United States responded to a question as follows:

> The—the key point that you're missing there is that if you interpret 2000e-2(m) in that way, you would be rendering superfluous 2000e- 2(a)(1) which requires but for cause by virtue of the because of language. And if—if under the—that's because in order to show a violation, a plaintiff would only have to show motivating factor, not but for cause. It would render—no plaintiff would ever seek to prove a 2000e-2(a) case. They'd always seek to prove a 2000e-2(m) case.[66]

Later in the oral argument, the attorney for Costa was pressed on the continuing viability of *McDonnell Douglas* if the Court affirmed the Ninth Circuit. He attempted to rely on the Ninth Circuit's explanation that *McDonnell Douglas* would not be swallowed by mixed motives, but he finally agreed that any case that proceeded beyond summary judgment

62. *Id.* at 2154-55.

63. *Id.* at 2151 n.1.

64. See *infra* the discussion of the Ninth Circuit majority in *Costa* regarding the continuing viability of *McDonnell Douglas*.

65. *See, e.g.*, Zimmer, *Chaos or Coherence*, *supra* note 40, at 699; Kearney, *supra* note 40, at 310-11.

66. *See* Oral Argument, No. 02-679 (Apr. 21, 2003) (Oral Argument of Irving L. Goldstein on Behalf of the United States as Amicus Curiae Supporting the Petitioner), 2003 WL 2011040, at 24-25 [hereinafter Oral Argument].

would be under mixed-motives.[67]

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67. QUESTION: Is—is this correct, that *McDonnell Douglas* survives on your reading in a case in which the defendant does not go forward with anything? The plaintiff puts in enough to make a prima facie case. Defendant sits mute. *McDonnell Douglas* controls the result there. If the defendant does go forward with something at that point—and—and here I'm not sure of this, but I think—by definition, it then becomes a mixed-motive case, doesn't it? Under (m)?

MR. PECCOLE: I believe it does.

QUESTION: Okay.

MR. PECCOLE: I think—

QUESTION: So *McDonnell* survives in the case of the mute defendant. In the non-mute defendant, (m) governs everything.

MR. PECCOLE: Let me see if I can answer. *McDonnell Douglas*, as has been suggested—it's used at the very preliminary stage of a—of a case. *McDonnell Douglas* at some point in that decision then bursts. It goes away. And so what you're left with is the 71—or 703(a) and the 703(m). Now, I'm—here I'm—again I'm relying on what the Ninth Circuit said. They are still giving *McDonnell Douglas* cases some deference, but what they are saying in fact is yes, once you're past that stage, basically the 703(m) cases will come into play. That will be the instructions to the jury.

QUESTION: Does it—does it—just for clarifying in my mind, does it matter or doesn't it matter whether you say (m) governs a separate set of cases? When I came in, I thought the answer to that was no, it doesn't, that (e) governs every case because the cause can govern the two-motive cases too, and that in (m) Congress was simply clarifying that there could be such cases, and then they go on to say what happens. But the Government made a very good point and said no, I shouldn't look at it that way and I should look at it as if e governs the single-motive case and then (m) comes in to govern the dual-motive case. And that was a good argument too. And so what I'm asking you, who understands this a little better than I do, does it matter?

MR. PECCOLE: No.

QUESTION: No, it doesn't matter. That's it.

QUESTION: Well, how many—what percentage of all these cases, do you think, are single-motive cases?

MR. PECCOLE: To guess, I would—I would say probably a vast majority of the cases are. They're—or not single. Excuse me. Those are mixed-motive cases.

QUESTION: Well, you don't suggest the defendant always admits liability, do you?

MR. PECCOLE: No.

QUESTION: If there's only issue about one motive, it's always that the defendant has some kind of defense in every case.

QUESTION: If he stands mute, he—he loses. I mean, under *McDonnell*

The oral argument in the Supreme Court correctly demonstrates that affirming the Ninth Circuit killed off *McDonnell Douglas* except for single-motive cases. As the justice questioning Costa's attorney recognized, such cases are only those in which the defendant offers no reason, thus putting no second motive at issue. A defendant loses a case under the *McDonnell Douglas* analysis if the plaintiff makes out a prima facie case and the defendant does not bear its burden of production at stage two to produce a legitimate nondiscriminatory reason.[68] There are no such cases.

2. Confusion in the Ninth Circuit's En Banc Opinion

The Ninth Circuit did address the continuing viability of *McDonnell Douglas* in its en banc opinion in *Costa*. First, the Ninth Circuit said that *McDonnell Douglas* "primarily applies to summary judgment proceedings."[69] Beyond summary judgment, it is not relevant.[70] The court further misexplained that there was a distinction between *McDonnell Douglas*, which applies to summary judgment proceedings on the one hand, and single-motive and mixed-motives, which primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination.[71] The court explained its erroneous view on this matter by

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Douglas, if the plaintiff comes in with—with a claim that this was the motive and the—and the defendant doesn't come up with anything, he loses, doesn't he?

MR. PECCOLE: Yes.

QUESTION: So any case that goes forward is a mixed-motive—is a mixed-motive case.

MR. PECCOLE: Yes.

QUESTION: Yes.

MR. PECCOLE: Yes. And—and the only thing—the only time that I could see otherwise would be a—a specific instance where, for example, you have working women in a—in a department. The employer comes in and says we have to make a layoff because we're—we're in dire straits. We can't afford it. They lay off that whole division, and then 2 weeks later they hire a whole male division. I think that you have the single motive there and—and you—those are the only kind of cases I can think of.

QUESTION: Yes, they settle, don't they?

MR. PECCOLE: Yes. (Laughter.)

Oral Argument, *supra* note 66, 2003 WL 2011040, at 35-38.

68. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993).

69. *Costa*, 299 F.3d at 854.

70. *Id.* at 855 ("Regardless of the method chosen to arrive at trial, it not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury.").

71. *Id.*

saying that *McDonnell Douglas* may be used in a single-motive case, but plaintiffs are not limited to the pretext analysis.[72] The court then explained that at the conclusion of the trial, the court must decide to give the jury one of two possible instructions: 1) the mixed-motives instruction; or 2) an instruction that the jury can decide that the discriminatory reason was the sole reason, or it played no role in the employment action.[73] The Ninth Circuit was correct that there was some confusion about mixed motives and pretext, but it was the court that was confused.[74] The court failed to recognize that its decision that the motivating factor standard did not require direct evidence must necessarily abolish *McDonnell Douglas*. The dissent did recognize this.[75] Given the confusion in the Ninth Circuit opinion, perhaps it is small wonder the Supreme Court chose to affirm without getting into a discussion of the continuing viability of *McDonnell Douglas*.

B. Dead as a Doornail

McDonnell Douglas is dead for Title VII claims because the Supreme Court eradicated the direct evidence limitation that made motivating factor/mixed motives applicable to only a discrete set of cases. The Court's holding that a heightened showing through direct evidence is not required eliminates the limitation. All cases now will be mixed motives because that structure has a lower standard of causation than the pretext but-for standard. Plaintiffs will object to any application of the higher but-for standard.

The only way around this conclusion is to say that there is a subset of cases for which motivating factor/mixed motives is not applicable, and pretext/*McDonnell Douglas* applies to them. The Court seemingly left open that possibility, saying it was not required to decide whether the motivating factor standard applies to cases that are not mixed motives. As the oral argument exchanges demonstrate, however, this is an illusion.

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72. *Id.*

73. *Id.* at 856.

74. The court summarized its confusion as follows:

> *McDonnell Douglas* and mixed-motive are not two opposing types of cases. Rather, they are separate inquiries that occur at separate stages of the litigation. Nor are single-motive and mixed-motive cases fundamentally different categories of cases. Both require the employee to prove discrimination: they simply reflect the type of evidence offered.

Id. at 857.

75. *Id.* at 867 (Gould, J., dissenting) ("To keep the mixed motive framework from overriding in all cases the *McDonnell Douglas* rule and the pretext requirement, which it clearly was not meant to do, mixed motive analysis properly is available only in a special subset of cases.").

There is no such case unless a defendant simply says, we did not discriminate, and offers no reason for the employment action it took. Defendants would lose such cases under a pretext analysis, and there are no such cases. Once a defendant produces evidence of a legitimate, nondiscriminatory reason, the case has at least two motives at issue, and pretext analysis, with its higher standard of causation, is irrelevant.

First and most obviously, *McDonnell Douglas* cannot survive for purposes of jury instructions. Before *Costa*, among courts that addressed the issue, there was a split as to whether a court should give a pretext jury instruction based on *McDonnell Douglas*.[76] What the Ninth Circuit said in its *Costa* opinion, however, was that such an instruction can be given in a single-motive case. The single-motive jury instruction endorsed by the Ninth Circuit is, in fact, a pretext instruction. It is an all-or-nothing instruction. That is what the *McDonnell Douglas* pretext analysis does: it asks the factfinder to pick the one motive for the employment action. In light of the Ninth Circuit's holding that motivating factor and mixed motives apply without direct evidence, such an instruction is not possible. Once a defendant articulates a legitimate, nondiscriminatory reason, the case has become a mixed-motives case. It would not make sense to ask the jury to determine which reason was the sole reason for the employment action. All a plaintiff needs to establish liability is a finding that the discriminatory reason was a motivating factor, and that is a lower standard of causation than the single-motive/but-for standard.[77] If a plaintiff can satisfy the motivating factor standard, then the plaintiff is entitled to a mixed-motives jury instruction. Thus, if a defendant requested the Ninth Circuit's single-motive instruction, a plaintiff should object that she does not have to satisfy that standard. If a plaintiff cannot satisfy the motivating factor standard, then there is no falling back to a single-motive instruction for the plaintiff because that is a higher standard, and the plaintiff could not satisfy it. The justice's question at oral argument of Costa's attorney made this point:

> QUESTION: So any case that goes forward is a mixed-motive—is a mixed-motive case.
>
> MR. PECCOLE: Yes.
>
> QUESTION: Yes.[78]

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76. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002) (discussing the split and holding that under some circumstances it is reversible error to refuse to give a requested pretext instruction).

77. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Zimmer, *Chaos or Coherence*, *supra* note 40, at 696-97; Zimmer, *Emerging Uniform Structure*, *supra* note 40, at 607-09; Kearney, *supra* note 40, at 310.

78. *See supra* note 67.

Thus, the Ninth Circuit failed to recognize that its single-motive jury instruction was, in reality, a *McDonnell Douglas* pretext instruction, and it failed to recognize that such an instruction is not viable in light of its principal holding.[79]

The second point that the Ninth Circuit made regarding the continuing viability of *McDonnell Douglas* was that it is relevant to summary judgment. If this were true, then the *Costa* decision would not be that significant. Since *Hicks*,[80] the principal relevance of the pretext proof structure has been to motions challenging the sufficiency of the evidence (motions for summary judgment and motions for judgment as a matter of law). Defendants are enamored with *McDonnell Douglas* because it is the basis on which they move for summary judgments. After *Costa*, it is not even relevant to summary judgment. Suppose a post-*Costa* defendant moves for summary judgment, arguing that the plaintiff has not produced sufficient evidence of pretext. A plaintiff should respond by arguing that the pretext analysis has nothing to do with it. All the plaintiff must do is produce sufficient evidence that the illegal reason was a motivating factor, and that is a lower standard of causation than the pretext analysis requires.[81]

The only argument one could make for the continuing viability of *McDonnell Douglas* is that a plaintiff might prefer to prove her case under that proof structure, proving the higher standard of causation, in order to deprive a defendant of the same-decision defense. That argument seems fanciful, however, in light of plaintiffs' current preference for the mixed-motives analysis and its burden shift to the defendant.

In sum, *McDonnell Douglas* is not procedurally relevant any longer at the stage of jury instructions or even summary judgment. It is dead.

IV. ARE THE COURTS PAYING THEIR RESPECTS TO *MCDONNELL DOUGLAS*?

I thought that judges and lawyers, who are conservative and reluctant to change, would cling to *McDonnell Douglas* in the aftermath of *Costa*. It was obvious that it would not take long for courts to begin discussing the issue because the two proof structures are used to analyze all disparate treatment employment discrimination cases. In the first few months after the *Costa* decision was rendered, the results have been mixed. At least two

79. *See* McKay, *supra* note 53, at 519.

80. 509 U.S. 502 (1993).

81. One of the pre-*Costa* commentators came very close to this conclusion, but not quite. "The pretext analysis of *McDonnell Douglas-Burdine* would remain relevant, but only insofar as the burden-shifting scheme allows plaintiffs to show that an impermissible consideration was a motivating factor." Mizer, *supra* note 40, at 264. He is correct that *McDonnell Douglas* is of no use to defendants, but he suggests that plaintiffs could use it. Maybe plaintiffs could fit their evidence into it, but it has no procedural significance anymore.

courts have placed flowers on the grave and bid *McDonnell Douglas* farewell. Some courts have said *McDonnell Douglas* lives. Others have avoided the issue.

The most comprehensive treatment of the effect of *Costa* on *McDonnell Douglas* is in *Dare v. Wal-Mart Stores, Inc.*[82] In *Dare*, the court evaluated the plaintiff's claim as a single-motive claim.[83] The court thus analyzed whether, after *Costa*, the motivating factor/same-decision defense analysis applies to a single-motive case. In other words, are there any cases left to which the *McDonnell Douglas* analysis applies? The court concluded that the motivating factor/same-decision defense analysis applies to single-motive cases.

First, the court reasoned that nothing in the language of the Civil Rights Act of 1991 restricts the analysis to mixed-motives cases.[84] Second, the court explained that "interests of clarity and accuracy" require application of the analysis to single-motive cases.[85] By this, the court meant two things. First, the *McDonnell Douglas* analysis, by requiring that the factfinder determine the single true reason for the employer's adverse action, seldom if ever reflects reality, as employers rarely make employment decisions for one reason.[86] Thus, the *McDonnell Douglas* proof structure creates a legal fiction.[87] Second, the court recognized that a single-motive case is a chimera. Once an employer articulates a legitimate nondiscriminatory reason at stage two of *McDonnell Douglas*, a court is left with a classic mixed-motives scenario.[88] Applying the motivating factor/mixed-motives analysis to the defendant's motion for summary judgment, the court held that the plaintiff's claims should proceed to trial, but the court also held that the defendant could file a motion for summary judgment on its same-decision defense to limit damages.[89] The court held, however, that the intentional discrimination claim under state employment discrimination law still would be evaluated under *McDonnell Douglas* because state law had incorporated neither the *Price Waterhouse* analysis nor the Civil Rights Act of 1991.[90] Another federal district court was persuaded by *Dare* in *Griffith v. City of Des Moines*.[91]

A federal district court considered the *Dare* opinion and expressly rejected the idea that *Costa* spells the demise of the *McDonnell Douglas*

82. 267 F. Supp. 2d 987 (D. Minn. 2003).
83. *Id.* at 990.
84. *Id.* at 990-91.
85. *Id.* at 991.
86. *Id.* at 991-92.
87. *Id.*
88. *Id.* at 992.
89. *Id.* at 993.
90. *Id.* at 992.
91. 2003 WL 21976027 (S.D. Iowa July 3, 2003).

analysis in *Dunbar v. Pepsi-Cola General Bottlers of Iowa.*[92] The court reviewed the decisions addressing the continuing viability of *McDonnell Douglas* after *Costa* and concluded that "this court does not believe that *Desert Palace* and §2000e-2(m) necessarily spell the demise of the entire *McDonnell Douglas* burden-shifting paradigm."[93] The court reasoned that *Costa* requires only a modification of the third part of the analysis. Under the modified part three, a plaintiff must prove by a preponderance of the evidence either that the defendant's part-two legitimate, nondiscriminatory reason is pretextual or that, while it is a true reason, it is only one reason, and the prohibited reason is also a motivating factor.[94] The court did admit, however, that it had difficulty envisioning a case in which no possibility of mixed-motives was raised by the evidence on a summary judgment record.[95]

The Eighth Circuit declined to decide the effect of *Costa* on *McDonnell Douglas* in *Allen v. City of Pocahontas, Ark.*[96] In *Elmahdi v. Marriott Hotel Services, Inc.*,[97] however, the Eighth Circuit applied the *McDonnell Douglas* analysis to a Title VII claim without any mention of *Costa.*

A federal district court rejected the demise of *McDonnell Douglas* in an age discrimination claim in *Bolander v. BP Oil Co.*[98] The court explained that "the mixed-motives rationale and *Desert Palace* do not apply to age discrimination cases."[99]

V. WHO IS CELEBRATING A BIRTH AND WHO IS MOURNING A DEATH?

For now, it is clear that plaintiffs, employee rights advocates, and many scholars are celebrating the birth of the new era in Title VII law with the ascendancy of mixed-motives. It is defendants and their attorneys who are mourning the mortal wounding (they may not admit death) of *McDonnell Douglas.* A struggle has already begun about the continuing viability of *McDonnell Douglas.* If courts ultimately conclude that it is dead, what will be the effect of all Title VII cases (and perhaps employment discrimination claims under other statutes) being tried under the motivating factor and mixed-motives analysis? I am not so sure that most will find their immediate emotional responses justified in the next few years. Even if they do not long for the return of *McDonnell Douglas,*

92. 2003 WL 22290229 (N.D. Iowa, Oct. 7, 2003).
93. *Dunbar*, 2003 WL 22290229, at *14.
94. *Id.* at *15.
95. *Id.* at *18 n.2.
96. 340 F.3d 551, 557 n.4 (8th Cir. 2003).
97. 339 F.3d 645 (8th Cir. 2003).
98. 2003 WL 22060351 (N.D. Ohio, Aug. 6, 2003).
99. *Bolander*, 2003 WL 22060351, at *3.

plaintiffs and their allies may find that the world under mixed-motives is not much better. Defendants, even if they still miss *McDonnell Douglas*, may find that life under mixed-motives is not that bad.

The post-*Costa* view is that plaintiffs will survive more defense motions challenging the sufficiency of the evidence and have more cases decided by juries. It is certainly true that under mixed motives, plaintiffs have avoided summary judgment much more successfully than under *McDonnell Douglas*.[100] If courts are concerned about weak discrimination cases getting to juries after *Costa*, however, they may raise the motivating factor standard. The pretext-plus/pretext-only battle bears witness to the fact that courts can interpret a standard in different ways.[101] In other words, it is possible that the spirit of *McDonnell Douglas*, which made summary judgments attainable in cases that courts did not think were strong enough to go to a jury, may manifest itself in a more stringent version of motivating factor. A second consideration is that defendants have one chance to win a mixed-motives case (proving the illegal reason was not a motivating factor), but a second chance to avoid almost all monetary remedies (proving they would have taken the same action absent the illegal reason). Although the burden of persuasion is on them on the same-decision defense, which should make summary judgment difficult, defendants may attempt to get summary judgment on the defense. The best prediction at this time would be that plaintiffs should survive more motions for summary judgment, but I think there are reasons to be skeptical about this.

The second result that is possible under *Costa* is that the mixed-motives jury instruction may not produce results as good as plaintiffs think it will.[102] Even if a plaintiff proves motivating factor, a defendant that prevails under the same-decision defense cuts off all monetary remedies (except attorney's fees and costs) and positive employment action, such as reinstatement or promotion.[103] Thus, if a defendant prevails on the defense, the plaintiff will go home a winner, but with no money.[104] One cannot

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100. Kearney, *supra* note 40, at 304 & n.8; *see also* Zimmer, *Emerging Uniform Structure*, *supra* note 40, at 607 (explaining that it is easier for plaintiffs to establish a prima facie case under the motivating factor test than under the but-for test of *McDonnell Douglas*).

101. Professor White argues that *Hicks* and post-*Hicks* applications of *McDonnell Douglas* are indicative of courts' concern about entrusting weak cases to juries after the Civil Rights Act of 1991 made jury trials available. *See* White, *supra* note 15, at 799-800.

102. Kearney, *supra* note 40, at 311 n.49 ("There is even a chance, however small, that a uniform motivating factor standard ends up assisting defendants in these cases. Instead of just one chance at winning, they now have two chances and two bases for appeal.").

103. 42 U.S.C. §2000e-5(g)(2)(B).

104. Professor Zimmer recognizes the second opportunity afforded defendants by the same-decision defense, but he believes that the Civil Rights Act of 1991 "reduce[d] the defendant's same-decision defense from a light at the end of the potential liability tunnel to

stand many victories like that. How likely is it that juries will find for defendants on the defense? More likely than many seem to assume. First, the defense permits a compromise; juries can find that the defendant discriminated, but not that badly. In a close case, it is an attractive option. Second, most people probably do recognize that most employment actions are taken for a number of reasons.[105] Most employees against whom adverse actions are taken have given employers some legitimate reasons on which they could act. Thus, the same-decision defense often reflects reality and people's sense of reality. Third, under *McDonnell Douglas*, the decision was all or nothing, and the defendant was more clearly a bad guy. No compromise was possible, and the employer was either telling the truth or lying.[106] Plaintiffs may find that juries are more likely to send them home with no money now that a compromise is possible; all or nothing may have been better.

A second reason why the same-decision defense may hurt plaintiffs is that appellate courts may focus on that, rather than the plaintiff's burden on motivating factor, as the basis for reversing jury verdicts for plaintiffs. If appellate courts try to compensate for the loss of *McDonnell Douglas* and what they perceive to be a very low standard of causation for the imposition of liability, they may focus on the same-decision defense.

In any event, *Costa* and the Civil Rights Act of 1991 do not mandate the demise of *McDonnell Douglas* analysis in cases under the ADEA, the ADA, state employment discrimination laws, and Section 1981. The triumph of the unitary standard may be limited to Title VII. It is possible that defendants will lose on motions for summary judgments under the mixed-motives analysis on Title VII claims and win on such motions under the *McDonnell Douglas* analysis on their state claims.[107] Moreover,

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a night light, only allowing the successful defendant to escape paying the plaintiff full legal and equitable relief." Zimmer, *Emerging Uniform Structure, supra* note 40, at 609. I predict that a plaintiff who falls victim to the defense and goes home with no money and no positive employment action will feel like she was hit by a train.

105. I shy away from saying they are in fact motivated by a number of reasons because I think Professor Linda Krieger has made a convincing case that employment decisions are cognitive rather than motivational processes. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity*, 47 STAN. L. REV. 1161 (1995).

106. The characterization of an employer that is found to have given pretextual reasons for its actions as a liar was debated by Justice Scalia and Justice Souter in their majority and dissenting opinions in St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Although I think Justice Scalia, arguing that such a characterization often is inapplicable, got the better of that debate, it seems probable that a factfinder is likely to find an employer liable for discrimination if it does not believe the employer's witnesses. *See, e.g.*, Kearney, *supra* note 40, at 310-11 ("After catching the employer in a lie, the jury will likely find that the intent the employer was hiding was actually what motivated the decision.").

107. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 993-94.

plaintiffs claiming age discrimination, disability discrimination, and race discrimination under Section 1981 may not get the same ostensibly favorable analysis that Title VII plaintiffs get.

VI. CONCLUSION

In *Costa*, we have witnessed a birth and a death. Both could dramatically change the world of employment discrimination law. Like Eliot's magi, we have lost the comfort of being in a familiar world. Lawyers generally do not like change. Expect lawyers, particularly defense lawyers, and courts to try to cling tenaciously to *McDonnell Douglas*. Once the death of *McDonnell Douglas* is accepted, however, it will be interesting to see who is mourning and who is celebrating. My guess is that the spirit of *McDonnell Douglas* will not rest in peace, and it is likely to rule from the grave, eventually producing a post-*Costa* law that is not so different from the one when it lived and ruled for thirty years. Moreover, even if dead under Title VII, where it was born, it may still roam restlessly in the realm of discrimination laws other than Title VII.

Happy thirtieth birthday, *McDonnell Douglas*. May you rest in peace?